No. 410.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

No. 410.

LOUIS JACOBS, *Plaintiff in Error,* vs. DORA MARKS, *Defendant in Error.*	Writ of Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR

AND

OPINIONS OF STATE COURTS.

LOUIS J. BLUM,
EDGAR C. BLUM,
ATTORNEYS FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

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Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

LOUIS JACOBS,
Plaintiff in Error,
vs.
DORA MARKS,
Defendant in Error.

Writ of Error to the Supreme Court of Illinois.

BRIEF AND ARGUMENT.

STATEMENT OF CASE.

In the declaration filed in the Circuit Court of Cook County, Illinois, by the defendant in error in this case, she sets forth that by means of false representations, the plaintiff in error induced her to become a member of a corporation known as the Chicago Furniture & Lumber Company, and to invest $5,000 in its stock; that the corporation had ceased doing business, her stock had become worthless and her money lost. Having at one time received back $1,000 from the corporation, her claim, according to her testimony, is for $4,000.

By pleas in bar, the plaintiff in error set up that the same claimant, Dora Marks, had theretofore instituted an action in the Circuit Court of Delta County, Michigan, against the Chicago Furniture & Lumber Company for the recovery of the same $4,000; that the court had jurisdiction of the parties and the subject-matter; that the parties had made a settlement, and pursuant thereto the court had

entered a judgment in these words: "This cause having been settled, it is hereby discontinued by consent of both parties without cost to either party." And that she had, therefore, received full satisfaction of the claim upon which the present suit is based.

Upon the trial, the plaintiff in error introduced, and the court received in evidence, a copy, exemplified in accordance with the act of Congress, of the proceedings in the Michigan case, including the judgment. Both of the parties to this cause testified that the two suits involved the same subject-matter.

The defendant in error thereupon introduced in evidence a written agreement, upon which the order of the Michigan court was based and which is as follows:

> Articles of agreement made and entered into this 14th day of July, A. D. 1894, by and between the Chicago Furniture & Lumber Co., a corporation, of the City of Escanaba, Delta County, Michigan, parties of the first part, and Dora Marks, of Denver, Colorado, party of the second part. Party of the first part agrees to purchase $20,000 (twenty thousand dollars) worth of stock of the Chicago Furniture & Lumber Company which the party of the second part holds for the sum of $4,000 to be paid as follows: $1,000 to Mead and Jennings, attorneys for said party of the second part, as soon as the parties of the first part dispose of their stock to the amount of a thousand dollars or interest other capital in said company to the amount of a thousand dollars; and $3,000 to said party of the second part on the day that the plant now occupied by the parties of the first part in said City of Escanaba is turned over to them and a clear title to the property earned by them. Parties of the first part further agree to discontinue the damage suit now pending against the party of the second part without cost. Said parties of the first part further agree to release said party of the second part from all liability of said second party

for the balance due on unpaid stock. Party of the second part agrees to sell her said stock of $20,000 to the parties of the first part and accept payment as aforesaid mentioned. Party of the second part also agrees to discontinue the suit now pending under attachment proceedings against party of the first part without cost. Said stock to be transferred as paid for. In witness whereof the parties have hereunto set their hands and seals the day and year first above written. (Signed) Chicago Furniture & Lumber Company, per N. Neufeld, president; B. Wolf, secretary; Dora Marks.

Notwithstanding the objections of plaintiff in error, the defendant in error was then allowed to testify that in July or August, 1894, she had called upon the president of the corporation to carry out this agreement. She says: "He never carried it out. He said he would not give me anything; that the stock was not worth anything, and he said he would not give me a cent for the stock."

The plaintiff in error requested the court to instruct the jury that the settlement set forth by the Michigan jury constitutes a bar to this action. These instructions, which are set out in the specification of errors relied upon, were refused by the court.

The jury rendered a verdict for $4,000, and the plaintiff in error entered a motion for a new trial. One of the grounds set up in that motion is: "The verdict and the action of the court fail to give full faith and credit to the judgment of the Circuit Court of Delta County, Michigan, in the case of DORA MARKS v. THE CHICAGO FURNITURE & LUMBER COMPANY, contrary to article 4, section 1 of the constitution of the United States, which provides: Full faith and credit shall be given in every state to the public acts, records and judicial proceedings of every other state."

This motion having been overruled, the court rendered a judgment, which, on appeal, was first reversed, then, on rehearing, affirmed by the Appellate Court of Illinois, and again affirmed by the Supreme Court of Illinois. In each of these courts, the rights of the plaintiff in error, under the Federal Constitution, were expressly set up and claimed.

Errors Relied Upon.

1. The court below erred in failing to give full faith and credit to the judicial record and proceedings of the Circuit Court of Delta County, State of Michigan, in the case of Dora Marks v. The Chicago Furniture & Lumber Company, which records and proceedings included the following order of court: "This cause having been settled, it is hereby discontinued by consent of both parties," which said suit, as shown by the evidence in this cause, involved the same subject-matter involved in the present suit, and which said judicial records and proceedings were duly pleaded in bar herein by the plaintiff in error and introduced in evidence on the trial of this cause. And in failing to hold that said judgment, record and proceedings of the Michigan court constituted a bar to the present action, the courts below failed to give full faith and credit to the record and judicial proceedings of the said Circuit Court of Delta County, Michigan, contrary to article 4 of the Constitution of the United States, which provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

2. The Supreme Court of Illinois erred in failing to reverse said judgment by reason of the failure of the courts below to give full faith and credit to said judicial records and proceedings of the Circuit Court of Delta County, Michigan, as required by said article 4 of the Constitution of the United States.

3. The Supreme Court of Illinois erred in failing to reverse said judgment by reason of the refusal of the Circuit Court of Cook County to give the following instruction asked by the plaintiff in error: "16. The jury are instructed that it appears by a certified copy of the record of the judgment entered in the case of DORA MARKS v. THE CHICAGO FURNITURE & LUMBER COMPANY in the Circuit Court of Delta County, Michigan, that said cause was settled between said parties; that said cause pending in said Michigan court was based upon the same cause of action on which the present suit is based, and involved the same subject-matter, and that the settlement of said cause constituted a settlement of the present cause of action." By this refusal the said Circuit Court failed to give full faith and credit to the judicial records and proceedings of the said Circuit Court of Delta County, Michigan.

4. The court below erred in failing to reverse said judgment by reason of the refusal of the Circuit Court of Cook County to give the following instruction asked by the plaintiff in error:

"18. You are instructed that the undisputed evidence in this case shows that in December, 1893, the plaintiff herein brought a suit in the Circuit Court of Delta County, Michigan, against the Chicago Furniture & Lumber Company upon the same cause of action and

involved the same subject-matter involved in this suit. That thereafter the parties to said suit came to a settlement thereof, and that settlement is a complete bar to the present action and your verdict must be for the defendant herein." By this refusal, the said Circuit Court failed to give full faith and credit to the judicial records and proceedings of the said Circuit Court of Delta County, Michigan, in evidence in this cause.

5. The court below erred in failing to reverse said judgment by reason of the refusal of the Circuit Court of Cook County to give the following instruction asked by plaintiff in error:

"21. The jury are instructed to find a verdict for the defendant herein." By this refusal the said Circuit Court failed to give full faith and credit to the judicial records and proceedings of the said Circuit Court of Delta County, Michigan, in evidence in this cause.

6. The Supreme Court of Illinois erred in not reversing said judgment by reason of error of the Circuit Court in denying the motion of plaintiff in error to set aside the verdict and grant a new trial herein on the grounds specified in said motion for new trial that "the verdict and the action of the court fail to give full faith and credit to the judgment of the Circuit Court of Delta County, Michigan, in the case of DORA MARKS v. THE CHICAGO FURNITURE & LUMBER COMPANY, contrary to Art. 4, Sec. 1, of the Constitution of the United States, which provides: "Full faith and credit shall be given in every state to the public acts, records and judicial proceedings of every other state."

7. The judgment of the courts below failed to give full faith and credit to the judicial records and proceed-

ings of the Circuit Court of Delta County, Michigan, in said case of DORA MARKS v. THE CHICAGO FURNITURE & LUMBER COMPANY, and thus deprived the plaintiff in error of his rights and privileges under said article 4 of the Constitution of the United States.

BRIEF OF PLAINTIFF IN ERORR.

The plaintiff in error most respectfully submits for the consideration of the Court these propositions:

This Court has jurisdiction of a case presenting the question whether or no a judgment rendered in one state has received full faith and credit in the courts of another state.

HUNTINGTON v. ATTRILL, 146 U. S., 657.
CARPENTER v. STRANGE, 141 U. S., 87.
GREEN v. VAN BUSKIRK, 72 U. S., 307.
CRAPO v. KELLY, 16 Wall., 610.
DUPASSEUR v. ROCHEREAU, 21 Wall., 130.

A refusal to give due effect to such judgment denies to the party claiming under it a right secured to him by the Federal Constitution and laws.

HUNTINGTON v. ATTRILL, *supra.*
LAING v. RIGNEY, 160 U. S., 531.

This clause of the constitution requires not merely that such records be received in evidence, but that they be given effect.

CRAPO v. KELLY, *supra.*
CARPENTER v. STRANGE, *supra.*
LAING v. RIGNEY, *supra.*

The judgment of the Michigan court is a final judgment, not a mere non-suit.

U. S. v. PARKER, 120 U. S., 96.

BANK OF COMMONWEALTH v. HOPKINS, 2 Dana, 395.

MERRITT v. CAMPBELL, 47 Cal., 542.

HUBBELL v. U. S., 171 U. S., 209.

The Michigan judgment is not open to doubt nor contradiction in the courts of Illinois, but must be accepted by them as conclusive.

HUNTINGTON v. ATTRILL, *supra.*

SOUTHERN PAC. R. R. v. U. S., 168 U. S., 50.

LAST CHANCE MINING CO. v. TYLER MINING CO., 157 U. S., 683.

NEW ORLEANS v. CIT. BANK, 167 U. S., 371.

MASON LUMBER CO. v. BUCHTEL, 101 U. S., 639.

HOPKINS v. LEE, 19 U. S., 109.

2 STORY ON CONSTITUTION, Section 1310.

BIGELOW ON ESTOPPEL, 3rd Ed., 219-209.

2 BLACK ON JUDGMENTS, Sec. 625.

LAING v. RIGNEY, *supra.*

VOORHEES v. JACKSON, 10 Pet., 474.

MILLS v. DURYEA, 7 Cranch, 45.

CHRISTMAS v. RUSSELL, 5 Wall., 290.

NORTON v. HOUSE, Vol. 101, No. 3, Advance Sheets, Nat. Rep. System.

DUNLAP v. VOORHEES, 110 Mich., 109.

MUTUAL FIRE INS. CO. v. PHOENIX INS. CO., 105 Mich., 571.

DICKINS v. HAYES, 31 Conn., 417.

JACOBSON v. MILLER, 41 Mich., 98.

RAE v. HURLBURT, 17 Ill., 577.

The Michigan judgment affords record evidence of the fact that the subject-matter of the litigation in that court had been adjusted, and should have been given the same effect in Illinois that would be given it in Michigan, and no evidence is necessary or proper to prove the effect of the judgment in Michigan. It can have but one definite, inevitable effect anywhere, if its statement of fact is believed. All authorities, including the English and law dictionaries, agree as to the definition of the word "settled." Used in this sense, it means paid, and the statement that the case was settled or the claim paid, whether correct or erroneous, is conclusive, and not subject to review nor contradiction in the courts of other states.

(Authorities last cited.)

In no case wherein the meaning of the judgment or decree is obvious, as where the decree is a mere finding of facts, is proof of effect in the state wherein rendered, introduced or required. In the following cases the judgments and decrees have been given effect as a matter of course, without such proof:

REYNOLDS v. STOCKTON, 140 U. S., 254.
EMBRY v. PALMER, 17 Otto, 3.
CHRISTMAS v. RUSSEL, *supra*,
GREEN v. VAN BUSKIRK, *supra*.
MILLS v. DURYEA, 7 Cranch, 45.
SWEET v. BRACKLEY, 53 Me., 346.
ROGER v. ROGER, 15 B. Monroe, 375.
DESTREHAM v. SCUDDER, 11 Mo., 313.
HASSELL v. HAMILTON, 33 Ala., 283.
RAE v. HURLBUT, 17 Ill., 577.
LOWE v. MUSSEY, 41 Vt., 393.

The evidence of the defendant in error on the question of satisfaction was improperly admitted, but it does not

affect this case, as it in no way contradicts the recital in the record that a settlement was in fact made. It relates merely to the question whether or not the new agreement was performed, a question beyond the scope of the present inquiry.

In some cases a new agreement in itself affords satisfaction. In others, satisfaction is had only by its performance. In the former class of cases the remedy is upon the new promise.

SIMMONS v. CLARK, 56 Ill., 96.

BANK OF COMMONWEALTH v. HOPKINS, 2 Dana, 395.

CUMBER v. WANE, SMITH'S LEAD COS., 146.

In this case, the agreement itself and not its performance was relied upon. The defendant in error so construed the agreement, as is evidenced by the fact that two weeks after it was made, she caused her suit to be dismissed.

Moreover, she did receive satisfaction under the new agreement. She obtained a release, so far as the corporation is concerned, of the liability for the amount still due on her stock subscription. She obtained, or secured the right to obtain, a dismissal of the damage suit against her, and as the defendant in the Michigan case, by the terms of the order, was compelled to pay his own costs incurred before the dismissal of her suit against it, to that extent, there was a recovery by her and a judgment against it.

MERRITT v. CAMPBELL, 47 Cal., 546.

Moreover, the fact that she received nothing for the stock does not prove, as the courts below found, that she had not received satisfaction, as the new agreement did not diminish her rights in this regard. On the contrary, it increased them, for, while the Michigan court, before

the settlement, had held the corporation not liable in the action—as appears from its opinion in evidence herein—and had dissolved her attachment, by this new agreement a liability was assumed by the corporation to her, and she was thereby given a possible right of action which before she had not possessed.

When a plaintiff receives satisfaction, regardless of its source, his claim upon the same subject-matter is barred as against the world.

LOVEJOY v. MURRAY, 3 Wall., 1.

Although the corporation may not have been liable in the Michigan case, yet a release to it is a release to all against whom the claim is asserted.

LEDDY v. BARNEY, 139 Mass., 397.
BROWN v. MARSH, 7 Vt. 320.
HOPKINSON v. SHELDON, 37 Ala., 311.
LIVINGSTON v. BISHOP, 1 Johns., 290.
GUNTHER v. LEE, 45 Md., 60.

The fact that a settlement had been made appearing by unimpeachable record evidence, and the identity of the subject-matter of the two cases having been admitted, the plea of satisfaction presented no issue of contested fact for the determination of the jury, but presented only a question of law for the judgment of the court, and the court should, therefore, have given the instructions quoted in the specification of errors, holding the defense of satisfaction established by undisputed evidence and directing a verdict for the defendant.

Respectfully submitted.

LOUIS J. BLUM,
EDGAR C. BLUM,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1900.

Louis Jacobs, *Plaintiff in Error,*
vs.
Dora Marks, *Defendant in Error.*

ARGUMENT OF PLAINTIFF IN ERROR.

The jurisdiction of this Court is properly invoked when the question presented is whether or no the courts of one state have accorded full faith and credit to a judgment of a court of another state.

HUNTINGTON v. ATTRILL, 146 U. S., 657.
CARPENTER v. STRANGE, 141 U. S., 87.
GREEN v. VAN BUSKIRK, 72 U. S., 307.
CRAPO v. KELLY, 16 Wall., 610.
DUPASSEUR v. ROCHEREAU, 21 Wall., 130.

Article 4 of the Constitution of the United States provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." The act of Congress, passed in pursuance of this article, provides: "And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

Under the constitutional provision and law quoted, the judgments of a state are entitled in the courts of another state to the credit and effect which they receive in the state in which they are rendered, and a refusal to give them "the force and effect in this respect which they had in the state in which they were rendered, denies to the party a right secured to him by the constitution and laws of the United States."

HUNTINGTON v. ATTRILL, *supra.*
LAING v. RIGNEY, 160 U. S., 530.

CONCLUSIVENESS OF THE MICHIGAN JUDGMENT.

The defendant in error had instituted, in the Circuit Court of Delta County, Michigan, a suit based upon the subject-matter involved in this suit. The judgment in that case, entered in pursuance of the agreement of the parties, recites: "This cause having been settled, it is hereby discontinued by consent of both parties, without cost to either party."

We respectfully submit that this recital, whether correct or erroneous, was conclusive upon the courts of Illinois, and that these courts were precluded from inquiring into the facts and circumstances relating to the settlement. Judgments import absolute verity and cannot be contradicted.

"The errors of the court do not impair their validity, binding till reversed, any objection to their full effect must go to the authority under which they have been conducted. * * * It is a record importing absolute verity."

VOORHEES v. JACKSON, 10 Pet., 475.

When duly pleaded and proved in a court of another state, "they have the effect of being not merely *prima facie* evidence, but conclusive proof of the rights thereby adjudicated."

HUNTINGTON v. ATTRILL, *supra.*

"The framers of the constitution intended to give not only faith and credit to the public acts, records and judicial proceedings of each of the states, such as belonged to those of all foreign nations and tribunals, but to give to them *full* faith and credit; that is, to attribute to them positive and absolute verity so that they cannot be contradicted or the truth of them be denied, any more than in the state where they originated."

2 STORY ON THE CONSTITUTION, Sec. 1310:

"Nor can error of fact be set up against the judgment."

BIGELOW ON ESTOPPEL, 3rd Ed., P. 219:

"Such judgments are to be regarded as record evidence throughout the Union." id. pp. 226-209.

"It is very necessary to be borne in mind in connection with the rules just stated that the averments or disclosures of the record in respect to the matters decided cannot be controverted by any extraneous evidence. They may be explained when ambiguous. They may be made specific when generally expressed, but they cannot be contradicted."

2 BLACK ON JUDGMENTS, Sec. 625.

"The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction when collaterally questioned is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular and irreversible for error."

LAING v. RINGLEY, *supra.*

MILLS v. DURYEA, 7 Cranch, 45.

MASON LUMBER CO. v. BUCHTEL, 101 U. S., 638.

SOUTHERN PAC. R. R. v. U. S., 168 U. S., 50.

LAST CHANCE MINING CO. v. TYLER U. CO., 157 U. S., 683.

NEW ORLEANS v. CITIZENS BANK, 167 U. S., 371.

CHRISTMAS v. RUSSELL, 5 Wall., 290.

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DICKINS v. HAYES, 31 Conn., 417.

JACOBSON v. MILLER, 41 Mich., 198.

RAE v. HURLBUT, 17 Ill., 577.

EFFECT OF MICHIGAN JUDGMENT.

The courts of a state being required by the Federal Constitution and laws to give to the judgment of the court of another state the effect that it would have in the courts of the latter state, the question arises, how is that effect to be determined? By evidence, where a judgment is susceptible of a variety of constructions and its legal effect is doubtful; without evidence, when the words are clear and leave no room for doubt or misconstruction, as when the judgment contains a mere recital of facts. In a case like the one now before the Court, no evidence has ever been adduced or required. That part of the judgment which relates to the settlement is a mere recital of fact, whose meaning is determined by the presumption that words employed by a court are designed to convey

the meaning which common usage gives them. The judgment says that the case was settled, and the lexicographers agree as to the definition of that term, employed in this connection.

> "Settle: To bring to a conclusion (that which has been in dispute or uncertainty); decided; determined, as to *settle* a difference; to *settle* a contest." —Standard Dictionary.
>
> "Settled: Arranged or adjusted by agreement, payment or otherwise, as a *settled* account."—Century Dictionary.

The Michigan judgment is, therefore, self-explanatory, as much so as if it recited that the claim had been paid, and no less so than is the ordinary chancery decree containing a recital of facts or a judgment at law in dollars and cents. In such cases no proof has ever been required as to the effect of such judgment or decree in the state in which it had been rendered, and the necessity for such proof has never even been suggested by counsel or considered by the courts.

REYNOLDS v. STOCKTON, 140 U. S., 254.
EMBRY v. PALMER, 17 Otto, 3.
CHRISTMAS v. RUSSELL, *supra.*
GREEN v. VAN BUSKIRK, *supra.*
MILLS v. DURYEA, 7 Cranch., 45.
SWEET v. BRACKLEY, 53 Me., 346.
ROGER v. ROGER, 15 B. Monroe, 375.
DESTREHAM v. SCUDDER, 11 Mo., 313.
HASSELL v. HAMILTON, 33 Ala., 283.
RAE v. HURLBUT, 17 Ill., 577.
LOWE v. MUSSEY, 41 Vt., 393.

The case of LAING v. RIGNEY, *supra,* furnishes an excellent illustration of the nature of proceedings requiring proof as well as those requiring none. That action

was brought in a New York court to enforce a New Jersey decree, based on a supplemental bill of which no personal service was had, and evidence was introduced to prove what effect would be given to these proceedings in the courts of New Jersey. But no proof was offered as to the meaning or effect of the facts found by the decree or relief granted, and obviously none was necessary, for the court, reversing the New York court, compelled the enforcement of the decree without any such evidence.

Retraxit and Non-suit.

The Supreme Court of Illinois, in its opinion, says:

> "The effect of the transaction between the plaintiff and the furniture and lumber company was a mere dismissal of her action, or an abandonment of her action as against the furniture and lumber company, for which she recovered nothing in return."

With due respect for that court, we shall endeavor to demonstrate, firstly, that it erred in its construction of the law; and, secondly, that it misapprehended the facts —based on undisputed evidence—applicable to the case.

The question of law involved has been expressly decided by this Court in a case perfectly analogous in the point here involved to the present case. The action arose upon a claim against the United States. The defense set up was an order entered in a former suit for the same claim in these words:

> "Whereupon, in open court, on motion of defendant's attorney, the district attorney, representing the United States, consenting thereto, the following judgment was duly made and entered, to wit: 'Upon motion of Ellis & King, attorneys for defendants, and it appearing to the court that the subject-matter in this suit has been adjusted and settled by the

proper parties in Washington, it is, therefore, ordered that this cause be, and the same is hereby, dismissed."

In determining the effect of this order the Court says:

"The second question is whether the judgment rendered in the first action was final. It is claimed to be equivalent only to a nonsuit, and, therefore, not *res judicata*. A judgment of nonsuit, whether rendered because of the failure of the plaintiff to appear and prosecute his action or because upon the trial he fails to prove the particulars necessary to make good his action, or when rendered by consent upon an agreed statement of facts, is not conclusive as an estoppel, because it does not determine the rights of the parties. HOMER v. BROWN, 57 U. S. (16 How.), 354; HALDEMAN v. U. S., 91 U. S., 584; MANHATTAN LIFE INS. CO. v. BROUGHTON, 109 U. S., 121. But a nonsuit is to be distinguished from a *retraxit*. MINOR v. MECHANICS BANK, 26 U. S., 1 Pet., 46. Blackstone defines the difference as follows: 'A *retraxit* differs from a nonsuit in this: one is negative and the other positive. The nonsuit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open voluntary renunciation of his claim in court, and by this he forever loses his action.' 3 Bl. Com., 296. And it has been held that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves through the judgment of the court, as will constitute a defense to another action afterwards brought upon the same cause of action. BANK OF COMMONWEALTH v. HOPKINS, 2 Dana, 395; MERRITT v. CAMPBELL, 47 Cal., 542. It is clearly so when, as here, the judgment recites that the subject-matter of the suit had been adjusted and settled by the parties. This is equivalent to a

> judgment that the plaintiff had no cause of action, because the defense of the defendant was found to be sufficient in law and true in fact. Upon general principles of the common law, regulating the practice and procedure of courts of justice, it must be held that the judgment here in question was rendered upon the merits of the case, is final in its form and nature, and must have the effect of a bar to the present action upon the same cause."
>
> U. S. v. PARKER, 120 U. S., 96.

In the case of BANK OF COMMONWEALTH v. HOPKINS, cited by the Court in the Parker case, the language of the order in question was: "Dismissed agreed." The Supreme Court of Kentucky says:

> "It has been frequently decided by this court that the legal deduction from a judgment dismissing a suit 'agreed' is that the parties had by their agreement adjusted the subject-matter of controversy in that suit."

In MERRITT v. CAMPBELL, also cited by the Court in the Parker case, the judgment under construction contained this recital:

> "Whereupon, by agreement of counsel for the respective parties, it is ordered by the court that this cause be dismissed, each party paying his own costs."

We believe that we are not departing from conservative ground when we assert that neither in the Federal nor State reports can one find a single case sustaining the position of the Illinois court in the language quoted. We do not mean to say that all cases go so far as the California court in MERRITT v. CAMPBELL in holding that an order of dismissal based on the agreement of the parties in itself constitutes a bar. But we have been able to find no case opposing the doctrine that where the judgment itself recites a settlement of the cause, that judgment be-

yond doubt constitutes a bar to another action. It must be so, for if the subject-matter of the suit has been adjusted, there is nothing left to litigate, and of the fact that it has been adjusted no better evidence can be adduced than record evidence, created by the parties in interest themselves.

There is another point of view from which this order may be considered. For the purpose of illustration, let us assume, for the moment, that, under the order of dismissal, the defendant in error did not enter a *retraxit*, but took a nonsuit, how would that construction impair the value of that part of the order which recites that the cause had been settled? Whatever may be the signification of the latter part of the judgment, dismissing the suit, the former part, finding the settlement, retains the same clear and inflexible meaning.

A settlement may, moreover, be made without any order of court or dismissal of the suit in any form, and would, if established, be effectual as a bar. The recital that the case had been settled would therefore be sufficient to meet our requirements in this case, if the rest of the order were eliminated.

If it is true that a settlement made without any order of court will, if established by proof, defeat another action based on the same subject-matter, what is the purpose of procuring an order of court reciting the settlement? Manifestly, there can be but one—to invest the transaction with the sanctity attached to a judicial act, and, by securing the record evidence of a court, instead of relying upon the mutable impressions of witnesses, to place it forever beyond dispute.

UNDISPUTED ISSUES OF FACT AND EFFECT THEREOF.

The Supreme Court of Illinois based its finding that no satisfaction had been received by the defendant in error on her oral evidence to the effect that she had received nothing for the stock. Under what rule of law this evidence was competent we have never been able to discover; but the exception taken at the time to its admission is not specifically assigned as error for the reason that the oral evidence is not important in the least. It in no way contradicts the recital in the Michigan judgment that the cause had been settled, nor does the defendant in error pretend that the entry of the judgment was procured by fraud nor that she failed to give her assent to it, nor that she was prevailed upon to settle by means of fraudulent inducements. All that she claims is that she received no money for her stock, and from this evidence the State Supreme Court concluded that "she received nothing in return."

It was this conclusion to which we had reference when we said that the court below misapprehended the facts relating to this branch of the case. The defendant in error did receive something in return. The satisfaction which she undoubtedly received was the dismissal, or right to procure the dismissal on her motion, of the damage suit pending against her; her release, so far as the corporation could release her, from liability on her stock subscription; and the agreement of the defendant in that suit to pay its own costs incurred up to that time—the judgment providing for a dismissal without cost to either party. That the last item mentioned of itself affords satisfaction is decided by the Supreme Court of Cali-

fornia. In that case the judgment, like this one, recited that the suit was dismissed by agreement, each party to pay his own costs. The court says:

> "In the case at bar there was not only a mutual agreement that the action be dismissed by the judgment of the court rendered pursuant to the agreement, but the defendant was by the terms of the agreement of this dismissal adjudged to pay the costs which, except for the agreement and the judgment by which it was carried into effect, he was not bound to pay, but might have otherwise recovered against the plaintiff. These costs he had paid before the commencement of the present action, and to that extent the plaintiff may be said to have obtained a recovery against the defendant in the action."
>
> MERRITT v. CAMPBELL, *supra.*

It may be said that, although in these other particulars, she received satisfaction, yet she failed in the most important respect, as she obtained no money. But in what way did the settlement injure her in that regard? By that settlement she lost no rights which she had theretofore possessed. On the contrary, her rights were increased, for, while the Michigan court had already held against her right of action—upon the grounds stated in its opinion in evidence in this case—by this new agreement the corporation assumed, or tried to assume, a liability such as she had vainly sought to enforce, and an action for the money could be instituted by her whenever the conditions provided in the agreement would exist. It thus appears that, however little she may have received under the new agreement, it was certainly in excess of what she paid for it.

But, conceding for the immediate purpose that the agreement of settlement was in no respect performed, that would not invalidate nor set aside the judgment of the

court. Nothing that the parties to that suit could do or leave undone would affect that order. The remedy of the defendant in error for a non-performance of the new agreement was upon that agreement.

> "The distinction seems to be that if the promise be received in satisfaction, it is a good satisfaction; but if the performance, not the promise, is intended to operate in satisfaction, there shall be no satisfaction without performance."
>
> SIMMONS v. CLARK, 56 Ill., 101.
>
> CUMBER v. WANE, Smith's Lead. Cas., 146.

> "If in such a case the original cause of action has not been actually extinguished by payment or other actual satisfaction, but was only transformed by the agreement of the parties into a new cause of action, the remedy must be on the latter and cannot be maintained on the former and extinguished cause of action."
>
> BANK OF COMMONWEALTH v. HOPKINS, 2 Dana, 395.

In this case the agreement itself and not its performance was received in satisfaction. That is the construction which the defendant in error herself placed upon the agreement, as is conclusively demonstrated by the fact that two weeks after the date of the agreement, without waiting for its performance, she procured the entry of the order by which her suit was dismissed.

The agreement contains no reservation, and, if it did, that would not be sufficient to limit the effect of the order, but the restriction would also have to be "contained in the order itself," according to the Parker case. If the settlement was in any way dependent upon future performance and failed by reason of a non-compliance with the conditions, the error of the Michigan court in finding an abso-

lute settlement should have been called to its attention in order that the necessary correction could be made. But this was not done, and the courts of another sovereignty now undertake to review that judgment and change it from an absolute to a conditional order, on the grounds that it does not truly recite the facts upon which it was based, and should not, upon the facts as found by the reviewing tribunals, have been a final order. The Supreme Court of Illinois undertakes in a collateral proceeding to rectify an error of the Michigan Circuit Court, over whose acts it has no supervisory control—an error which even in a direct proceeding could not have been corrected by the Supreme Court of Michigan, notwithstanding its appellate jurisdiction, inasmuch as the error had not been called to the attention of the trial court.

There is in the Illinois reports a record of another attempt on the part of a litigant to submit to the Illinois Supreme Court the right to dispute a judgment of a sister state, but that attempt was not equally successful. That was a case brought upon a judgment rendered by the Supreme Court of New York, and the defendant set up in his plea that the plaintiff, having, by means of a pretended settlement, procured the absence of the defendant, secured a judgment against the latter in his absence. It was not shown that the defendant had called these facts to the attention of the New York Supreme Court. The court, after discussing the effect of the New York law under the constitution and laws of the United States, says:

> "The agreement for the settlement of the suit was matter properly cognizable before that court, and should have been interposed for the purpose of postponing the trial before the referee, or should have been objected to the report, when judgment was

> moved thereon; or, if for any cause, the defendant could not then present the objection, he should, at the earliest opportunity, have applied to that court to open or set aside the judgment, and enforce the agreement to settle, or to let him in with a defense. Instead of doing this, he waits till he is sued on that judgment in another tribunal and in another state, and then substantially asks that a new trial be granted him in the original cause. * * * The plea was bad."
>
> RAE v. HULBERT, 17 Ill., 578.

Since 1856, the time this opinion was rendered, the law has undergone no change which would render the language above quoted inapplicable to the present case.

Having now shown the nature of the testimony relied upon by the Illinois Supreme Court to contradict the recital of the Michigan judgment, we recur now to the indubitable proposition that, when the fact of settlement was thus proven by that judgment, there could be no evidence of any kind competent to explain the means by which such settlement was obtained or objects sought to be attained by it.

> "The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means was it reached."
>
> LAST CHANCE MINING CO. v. TYLER M. CO., 157 U. S., 691.
>
> SOUTHERN PAC. R. R. v. U. S., 168 U. S., 49
>
> HOPKINS v. LEE, 19 U. S., 109.
>
> MASON LUMBER CO. v. BUCHTEL, 101 U. S., 639.

SOURCE OF SATISFACTION IMMATERIAL.

The fact that satisfaction was received from a party other than the plaintiff in error, creates only a difference in fact between this case and the Parker case, and not a distinction in law.

> "When the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages."
>
> LOVEJOY v. MURRAY, 3 Wallace, 1.

Although the corporation may not have been liable in the action in which the settlement was made, that fact would not impair the effect of the release.

> "The rule that a release of a cause of action to one of several persons liable operates as a release to all, applies to a release given to one against whom a claim is made, although he may not in fact be liable. The validity and effect of the release of a cause of action do not depend upon the validity of the cause of action. If the claim is made against one and released, all who may be liable are discharged, whether the one released was liable or not. BROWN v. CAMBRIDGE, 3 Allen, 474; GOSS v. ELLISON, 136 Mass., 503."
>
> LEDDY v. BARNEY, 139 Mass., 397.

The Supreme Court of Vermont quotes with approval the following from another Massachusetts case:

> "The reason is that there is but one debt or duty and that if once received by the obligee he can have no further claim; and if he discharge the one upon receiving a part or something else in lieu of the debt, or if he be satisfied so as to release one, the debt itself must be considered discharged." The court then proceeds to quote from Bacon and Coke to the

same effect, and says that "this doctrine seems to have been universally acknowledged, and there seems to have been yielded to it a general acquiescence."

BROWN v. MARKS, 7 Vt., 323.
HOPKINSON v. SHELDON, 37 Ala., 311.
LIVINGSTON v. BISHOP, 1 Johns., 290.
GUNTHER v. LEE, 45 Md., 60.

REFUSED INSTRUCTIONS.

In accordance with the foregoing principles of law, the plaintiff requested the court of original jurisdiction herein to give the jury these instructions:

"16. The jury are instructed that it appears by a certified copy of the record of the judgment entered in the case of DORA MARKS v. THE CHICAGO FURNITURE AND LUMBER CO., in the Circuit Court of Delta County, Michigan, that said cause was settled between said parties; that said cause pending in said Michigan court was based upon the same cause of action on which the present suit is based, and involved the same subject-matter, and that the settlement of said cause constituted a settlement of the present cause of action.

18. You are instructed that the undisputed evidence in this case shows that in December, 1893, the plaintiff herein brought a suit in the Circuit Court of Delta County, Michigan, against the Chicago Furniture and Lumber Company, upon the same cause of action and involved the same subject-matter involved in this suit. That thereafter the parties to said suit came to a settlement thereof, and that settlement is a complete bar to the present action, and your verdict must be for the defendant herein.

21. The jury are instructed to find a verdict for the defendant herein."

The court refused to give these instructions, but gave the following:

"You are instructed, if you find from the evidence that the plaintiff herein instituted a suit in the Circuit Court of Delta County, Michigan, against the Chicago Furniture & Lumber Company for the purpose of recovering the $4,000 involved in the suit now before you, and that she made a settlement of this cause with the defendant therein or anyone else, that the plaintiff is barred from the further prosecution of this suit, and the verdict of the jury must be for the defendant."

If the responsibility for the administration of constitutional law was to be shifted by the court to the jury, it was, of course, important that the jury be instructed upon the law on this point, and therefore the plaintiff in error offered this instruction. But he could not be compelled by the court to compromise his constitutional rights in this manner. He was entitled to the other instructions above set out, for the facts upon which they were based were not in dispute. The pendency and settlement of the Michigan cause were conclusively proved by the record, and that the two causes involved the same subject-matter was established by the evidence of both parties to the cause, and without any attempt at contradiction. This being so, the case did not rest upon any contested issue of fact requiring its submission to a jury, but presented only a question of law for the determination of the court.

Of course, the instructions were properly refused if the Illinois Supreme Court is justified in finding, as it does, that the facts set up in the plea of satisfaction were con-

tested by the defendant in error. But the court is in error. She did, by her replication, deny that the subject-matter of the two cases was the same, but this position was abandoned by her, as she herself testified that it was the same and made no attempt or pretense to prove the contrary, and all the other facts set up in the pleas of satisfaction, including the allegation that a settlement of the Michigan case had been made, were not disputed in the replication, nor in any way made an issue by her.

It is true that, if the instruction given by the court had been heeded by the jury, this case would then have been at an end. But the instruction failed to exert any influence, as appears by the result. Therefore, in the motion for a new trial, the plaintiff in error set up that the verdict and the action of the court failed to give full faith and credit to the Michigan judgment as required by Article 4 of the Federal Constitution, and the refusal of the court to grant a new trial upon this ground has been assigned as error in each court of review to which this cause has been taken.

Conclusion.

The Supreme Court of Illinois in its opinion finds that the Michigan case had not been settled because the agreement of settlement may perhaps not have been performed in all respects. But, to adopt the language of this Court in Carpenter v. Strange, *supra:* "That question was not open to the Supreme Court to decide, if it gave full faith and credit to the judicial proceedings of a sister state." The Illinois courts not only failed to give full faith and credit to the Michigan judgment, but utterly discredited and rejected that judgment. This point was specifically urged in all the courts below, and is, therefore, properly presented for the consideration of this Honorable Court.

Respectfully submitted.

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